Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the People of the	)	
State of California and the	)	PR Docket No. 94-105
Public Utilities Commission of	)	PR File No. 94-SP3
the State of California to Retain	)	
Regulatory Authority Over	)	
Intrastate Cellular Service Rates	)	

COMMENTS ON DRAFT PROTECTIVE ORDER

McCaw Cellular Communications, Inc. ("McCaw"),[1/] by its attorneys, hereby submits its Comments on the Draft Protective Order proposed by the Private Radio Bureau to permit review of confidential information submitted by the California Public Utilities Commission ("CPUC") in connection with the above-captioned Petition.[2/]

Ordinarily, the parties negotiating a protective order know precisely what information is potentially subject to disclosure. That is not the case here, because the carriers to whom the information presumably relates did not provide the data to the FCC. McCaw assumes that the information in question here is drawn from the data that it and other carriers submitted to the CPUC in connection with its recent state investigation of the cellular industry, and information on cellular marketing practices gathered in an investigation by the

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[1/] On September 19, 1994, McCaw became a wholly-owned subsidiary of AT&T Corp.

[2/] See Public Notice, Comments Sought on Draft Protective Order, PR Docket No. 94-105, DA 94-1083 (released September 30, 1994).

California Attorney General. However, none of the carriers know for certain the source or nature of the confidential information that would be disclosed if a protective order is adopted. This lack of precise knowledge makes it exceedingly difficult to comment upon the proposed protective order or to enter into any agreement with respect to the disclosure of the subject data.

In its Opposition to Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of the Protective Order, filed on October 4, 1994, McCaw opposed release of the CPUC's confidential information.[3/] McCaw argued that the CPUC's submission of the information was illegal; that the information was and should remain confidential given its extreme competitive sensitivity; and that the only party requesting requested access to the information, the National Cellular Resellers Association, had made no credible showing that such access was necessary. McCaw stands by these arguments. If, however, the Commission should determine that access to this information is appropriate, it can prevent competitive harm only by limiting disclosure in accordance with the following principles.

First, no information obtained by the CPUC from the California Attorney General, nor any carrier-specific information of any sort, should be released under any circumstances, and such information should be returned immediately to the CPUC. Absolutely no showing has been made that carrier-specific information, as opposed to aggregated information

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[3/] McCaw Cellular Communications, Inc., Opposition to Request for Access to California Petition For State Regulatory Authority Pursuant to the Terms of a Protective Order, PR Docket No. 94-105, PR File No. 94-SP3 (filed October 4, 1994) ("McCaw California Opposition").

showing market or industry trends, is necessary or helpful in connection with the Commission's review of the above-captioned petition.

Second, only aggregated data based upon carrier submissions in the CPUC's own investigation[4/] should be made available and only pursuant to a protective order that adequately protects the confidentiality of the information. Notwithstanding aggregation, the data will remain commercially sensitive. The protective order must limit dissemination of this information to attorneys and independent experts retained by parties to this proceeding; in no event should such information be disclosed to the parties or their employees. Moreover, the information should only be made available to parties who certify that they intend to comment upon the information. All parties should have an opportunity to comment on the data.

Third, if the CPUC chooses to submit any confidential data that it has not already provided to the Commission, the parties to this proceeding should have an opportunity to comment on the appropriateness of disclosing that data before it is made available. Parties should have an opportunity to comment on any additional data that may be made available.[5/]

[4/] California Public Utilities Commission Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications, I-93-12-007.

[5/] All parties should be required to comment concurrently on any confidential information that is made available. There is no justification for establishing special pleading cycles in which certain parties are permitted to file rebuttals to the comments of other parties on the confidential data. Cf. Motion of Cellular Resellers Association, Inc., et al. to Defer Filing Dates (filed Oct. 4, 1994).

I. THE COMMISSION SHOULD NOT DISCLOSE CARRIER-SPECIFIC INFORMATION, OR INFORMATION GATHERED IN THE CALIFORNIA ATTORNEY GENERAL INVESTIGATION, EVEN UNDER PROTECTIVE ORDER

The Commission must not presume that, even with a protective order in place, it is either necessary or appropriate to permit access to all of the confidential information submitted by the CPUC. The mere fact that the CPUC has selected certain types of information for submission to the Commission is not proof in itself that such information is material or relevant to the Commission's decision-making in this proceeding. In fact, there is no reason to believe that the Commission has any need whatsoever to consider carrier-specific data, as opposed to aggregated information, to determine whether market conditions in California are competitive. Similarly, the Commission has no basis for finding that the raw data submitted to the Attorney General will be of any use whatsoever in its decision-making.

As a threshold matter, it should be noted that every decision-maker who has been confronted with this issue has concluded that the information in question should be treated as confidential, and that its disclosure would cause competitive harm to the submitting carriers. The CPUC itself, in its Request for Proprietary Treatment, stated that "disclosure of the information could compromise the position of a cellular carrier relative to other carriers . . . ."[6/] Similarly, the Administrative Law Judge who presided over the CPUC proceeding in which this information was gathered found that submitting carriers had met the stringent

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[6/] California Public Utilities Commission, Request for Proprietary Treatment of Documents Used in Support of Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates, PR Docket No. 94-105 (filed August 9, 1994) ("Request for Proprietary Treatment").

standards established by the CPUC requiring a showing that disclosure of the data would lead to "imminent and direct harm of major consequence . . . ."[7/] As also recited in CPUC's Request for Proprietary Treatment, the California Attorney General made the investigatory material available only on the express condition that it not be disclosed.

No party has contested these findings, and the Commission should not reflexively assume that the adoption of a protective order is sufficient to release all of the information submitted by the CPUC. Given the competitive sensitivity of this information, the Commission must further find that the information is material and relevant to the issues before it before permitting access to the information under the protective order.

With respect to the carrier-specific data, there is simply no basis for making such a finding. While the CPUC cites carrier-specific data in making its arguments, this data is merely cited in support of general propositions. For example, the Commission cites carrier-specific capacity utilization data to support a general argument that carriers are not serving at maximum capacity.[8/] Absolutely no purpose is served by identifying individual carriers. The CPUC could make precisely the same point with average capacity utilization figures on a statewide, or at most, market-specific basis. The fact that the CPUC could not take the trouble to develop such aggregate figures is not a justification for disclosing such sensitive

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[7/] Administrative Law Judge's Ruling Granting In Part Motions for Confidential Treatment of Data, Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications, I.93-12-007 (July 19, 1994) ("ALJ July Ruling").

[8/] CPUC Petition at 51-54.

confidential data under any circumstances, even pursuant to a protective order.[9/] The same analysis applies to the other categories of carrier-specific data submitted by the CPUC.

Nor is there any justification for the use of the information submitted to the CPUC by the Attorney General. As indicated above, the Attorney General specifically requested that this information not be disclosed. Since this information has not been made public, McCaw can only speculate as to what it is. The Draft Protective Order, however, describes the redactions on pages 42, 45 and 75 of the CPUC's petition as material gathered in the Attorney General's investigation. Two of these redactions follow discussion of the fact that cellular carriers have made available service options involving longer contract terms at more advantageous rates with penalties for early termination. To McCaw's knowledge, no party has disputed the fact that these service options are available. The Commission may draw its own conclusions from the existence of these contracts.[10/] Nothing is added to this analysis, however, by raw, undigested carrier-specific information submitted in the course of an investigation. The only other material apparently gained from the Attorney General investigation is redacted from a section analyzing the similarity of cellular carrier rates based on publicly available information. Again, the Commission has no basis upon which to

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[9/] In cases where the CPUC has submitted only carrier-specific data on an issue, the CPUC should be required to take back the information and aggregate it prior to release to the parties. This is nothing more than what the CPUC should have done in the first place, if it had given appropriate consideration to confidentiality issues.

[10/] As argued in the McCaw California Opposition, the availability of diverse service options is evidence of competition, not its absence. Opposition of McCaw Cellular Communications, Inc. to the Petition of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Services Rates, PR Docket No. 94-105, at 39-40 (filed Sept. 19, 1994) ("McCaw California Opposition").

conclude that the raw information redacted from this discussion adds anything to the public facts already submitted by the CPUC.

The risks to competition and the commercial harm from the disclosure of carrier-specific data or material gathered by the Attorney General, even pursuant to a protective order, would be substantial, and there has been no showing that this information is material or necessary to the evaluation of the above-captioned petition. For these reasons, the information should not be disclosed under any circumstances. Rather, it should be returned to the CPUC immediately.

II. THE PROPOSED PROTECTIVE ORDER DOES NOT ADEQUATELY PROTECT CONFIDENTIAL INFORMATION

If there is to be any disclosure of the confidential information submitted by the CPUC, only aggregated data based upon carrier submissions in the CPUC's own investigation[11/] should be made available and only pursuant to a protective order that adequately protects the confidentiality of the information. As the Administrative Law Judge presiding in the CPUC proceeding determined, even aggregate data is competitively sensitive.[12/] If, for example, cost data is aggregated by individual MSA, this information would still give competitors, such as resellers, valuable information about the overall competitive posture of the two cellular carriers in the market.

[11/] If the CPUC is permitted to use other data in its aggregation, it will be impossible for McCaw or any other party to test the validity of the aggregated information.

[12/] See Administrative Law Judge's Ruling Granting Motion for Modification of July 19, 1994 Ruling, Investigation on the Commission's Own Motion in the Mobile Telephone Service and Wireless Communications, I.93-12-007 at 4-6 ("ALJ August Ruling").

In light of this competitive sensitivity, the Commission must modify the draft protective order to impose two additional safeguards. First, the Commission should limit access to information subject to the protective order to counsel for the parties.[13/] Aside from counsel, only independent experts working in conjunction with counsel in this proceeding should be permitted to review the data. Disclosure to any experts should not be permitted, however, if that expert provides any services relating to the marketing activities of any provider.[14/] Under no circumstances should the parties themselves, or "employees of the parties"[15/] be permitted to review the information. Such employees may be directly engaged in competitive activities, and mere legal prohibition of using information for "competitive business purposes"[16/] will not eradicate this information from their minds as they engage in such activities. In light of these concerns, the Administrative Law Judge presiding over the CPUC proceeding permitted only counsel and independent experts to review the data under protective order.[17/]

In addition, there is no justification for making this information available to all parties who have filed comments on the California petition to date. Just as the Commission has proposed a "need to know" standard for counsel,[18/] a "need to know" requirement should

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[13/] Cf. Draft Protective Order, § 3.a.

[14/] See July ALJ Ruling at 7-8.

[15/] Id. at § 3.b.

[16/] Id. at § 5.

[17/] ALJ July Ruling at 7-8.

[18/] Draft Protective Order, § 3.a.

be imposed with respect to the parties themselves. It is highly unlikely that the parties who have not to date submitted economic analyses using the public data already available in the record will do anything of substance with the mass of raw data proposed to be made available under the protective order. Prior to permitting access under the protective order, the Commission should require a written certification by the party that it intends to review and file comments based upon the information made available under protective order. In the event that a party subsequently decides not to file comments, it should be required to submit a written statement setting forth its reasons for not doing so. To the extent that any such written statements evidence bad faith, the Commission should consider imposing sanctions.

CONCLUSION

With the extraordinary attention devoted to the confidentiality issues in this proceeding, it is easy to lose sight of the fact that this contentious issue could have been avoided had the CPUC shown adequate regard for the confidentiality of information which the CPUC has all along viewed as confidential. The mere fact that the CPUC chose to disregard this confidentiality and submit extremely sensitive information in this proceeding cannot and should not bind the Commission to make this information available, even under

protective order. Rather, the Commission should carefully consider the types of information to be released, and should adopt the most stringent safeguards possible, as described herein.

Respectfully submitted,

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October 7, 1994

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CERTIFICATE OF SERVICE

I, James A. Kirkland, do hereby certify that on this 7th day of October, 1994, a copy of the foregoing Comments on Draft Protective Order was served by either first class mail, postage prepaid, or by hand delivery on the following:

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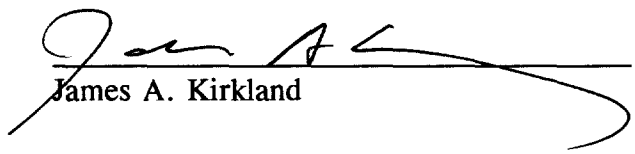

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